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No. 80-1883

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN GARGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals improperly affirmed petitioner's convictions for attempted income tax evasion and filing false tax returns on the basis of a theory not presented to the jury.

2. Whether petitioner was deprived of a fair trial by the refusal of a witness to testify on the basis of the witness's Fifth Amendment privilege.

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 1a-4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. 1a-4a). A petition for rehearing was denied on March 10, 1981 (Pet. App. 5a). The petition for a writ of certiorari was filed on May 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of attempted income tax evasion and on three counts of filing false income tax returns for the taxable

years 1973 through 1975, in violation of 26 U.S.C. 7201 and 7206(1). The government alleged that during the prosecution years petitioner failed to report as income the proceeds of some 145 checks, totalling approximately $520,000, which he received from Martin Lassoff, an attorney, thereby understating his income tax liability for the prosecution years by more than $200,000 (Pet. App. 2a; App. 290-292).[1] Although petitioner acknowledged receipt of the checks, he contended that they were the proceeds of interest-free loans made to him by Lassoff and hence were not taxable income (Pet. App. 2a). The jury returned a verdict of guilty on all six counts of the indictment. The district court sentenced petitioner to three years in prison, fined him $30,000, and placed him on probation for a period of three years following his release from confinement (App. 728-729). The court of appeals affirmed (Pet. App. 1a-4a).

During the prosecution years, petitioner was a federal workmen's compensation representative (App. 79-80). Although he was not an attorney, he was permitted to represent injured workers in administrative proceedings before the Workmen's Compensation Board. If the decision of the Board was appealed, however, petitioner could not continue to represent the injured worker, and he would refer the case to an attorney. He handled a large number of cases involving longshoremen, and there was evidence in the record to show that it was common practice for the attorneys to whom he referred cases to agree to pay him a share of the fees ultimately payable out of the compensation award—partly as a referral fee and partly as compensation for his services in the administrative processing of the cases while they were before the Board (App. 93-96, 138-140,

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[1] "App." references are to the record appendix filed by petitioner in the court of appeals.

146-155). One of the attorneys to whom petitioner referred cases in the prosecution years was Martin Lassoff (App. 90-94).

Lassoff was called as a defense witness. Out of the hearing of the jury, Lassoff indicated that he would invoke the Fifth Amendment with respect to any questions put to him by petitioner's counsel or by the prosecution; he was excused without testifying (App. 437-438). However, on cross-examination of the special agent who examined petitioner's returns, petitioner's counsel did introduce into evidence Lassoff's recorded answers to a series of questions propounded to him when he appeared in response to a summons issued by the special agent during the investigation (App. 253, 264-281). In the course of these questions and answers, Lassoff claimed that the checks he issued to petitioner represented loans and that he believed that petitioner would be able to begin to pay back these loans in April 1976 (App. 270-275). Lassoff also stated that he had not deducted his payments to petitioner as business expense items and that he considered that the amounts paid to petitioner were still his money (App. 274-275). The government's proof established that these monetary transactions between Lassoff and petitioner occurred on a weekly basis over a three-year period, without any loan documentation or other tangible evidence showing that petitioner had the means and the intent to repay the supposed loans (App. 168-179, 250, 277).

The court of appeals affirmed. It stated that the government had introduced ample circumstantial evidence to show that the payments from Lassoff to petitioner were income and that his failure to report them was willful (Pet. App. 2a-3a). The court also rejected petitioner's contention that the trial court should have compelled Lassoff to testify (Pet. App. 3a-4a), pointing out that Lassoff had ample reason to fear that his testimony concerning his transactions

with petitioner would incriminate him. Finally, the court rejected as "singularly unpersuasive" petitioner's suggestion, made for the first time on appeal, that the trial court should have compelled Lassoff to testify by granting him limited use immunity (Pet. App. 4a). In the court's view, petitioner had no compelling need for Lassoff's testimony in view of the other parallel evidence available to him concerning the transactions, especially after Lassoff's prior recorded statements had been admitted into evidence.

ARGUMENT

1. Petitioner argues (Pet. 14-16) that the court of appeals denied him due process of law by affirming his conviction upon a theory not presented to the jury, *viz.*, that petitioner had failed to sustain the burden of showing that the payments from Lassoff were loans. But the court of appeals did not decide the case on such a theory. To the contrary, it held that there was ample evidence to support the government's contention that the payments from Lassoff represented income (Pet. App. 2a-3a). This evidence included testimony of a former partner of Lassoff that petitioner had told him that he was receiving referral fees from Lassoff and that Lassoff confirmed this arrangement, the fact that the payments from Lassoff were made on a weekly basis over a three-year period with no evidence of repayments, the absence of any loan documentation covering the transactions, and the fact that two other attorneys testified they had paid referral fees during the years in question to petitioner (App. 95, 99, 139-141, 146-150, 153-154, 168-179).

Contrary to petitioner's argument, the reference in the opinion of the court of appeals (Pet. App. 3a) to petitioner's failure to prove that the payments were loans does not adopt a theory of guilt not presented to the jury. That reference relates only to petitioner's failure to substantiate his claim with respect to the character of the payments when faced with the government's proof that the unreported

funds were taxable income. *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954); *United States* v. *Slutsky*, 487 F. 2d 832, 842 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974). Here, the government proved the receipt of unreported funds as well as the existence of circumstances from which the jury could infer that these amounts represented referral fees or the payment of compensation for petitioner's services. Having established a prima facie case of unreported income, the government satisfied its burden of proving that petitioner's returns were false and that he had attempted to evade a substantial portion of his tax liability for the prosecution years.[2] At that point it was up to petitioner, if he wished, to submit evidence that would show that the payments were loans. Since he remained silent in the face of the evidence presented, it was at his own peril, *Holland* v. *United States, supra*, 348 U.S. at 138-139. The court of appeals therefore properly affirmed his conviction as based on sufficient evidence.

2. a. Petitioner further argues (Pet. 18-27) that the trial court erred in failing to compel the production of Lassoff's

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[2]*Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), cited by petitioner (Pet. 17), are inapposite. In both of those cases, the trial court had charged the jury that the element of malice or knowing conduct necessary to establish the crime of murder could be presumed from the defendant's unlawful act of killing the victim, unless the defendant sustained the burden of persuading the jury that he lacked the requisite intent at the time of the crime. No similar infirmity exists here. The government introduced evidence with respect to every element of the crimes charged, and the trial court correctly charged the jury that the burden of persuasion rested on the government with respect to each such element (App. 603-613, 616-621). The statement by the court of appeals (Pet. App. 3a) that petitioner had failed to establish his defense places no improper burden on the defendant, but merely expresses the truism that a defendant who desires to be acquitted in the face of a strong prosecution case would be aided in his defense by adducing evidence supporting a non-inculpatory explanation of the matters proved by the prosecution.

supposedly favorable testimony. But petitioner never asked the trial court to so rule. At trial, petitioner's counsel was content with a blanket statement by Lassoff that he would invoke his constitutional privilege with respect to all questions propounded to him (App. 435-438). Although the examination of Lassoff was conducted out of the hearing of the jury, petitioner's counsel neither sought to explore the basis for Lassoff's assertion of the privilege nor asked the court to do so.

Although a court of appeals may notice "[p]lain errors or defects" in a trial even though they were not brought to the attention of the trial court (Fed. R. Crim. P. 52(b)), such notice is limited to exceptional situations involving serious errors and substantial prejudice to the party seeking to raise them for the first time on appeal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); *United States* v. *Jacquillon*, 469 F. 2d 380, 386 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973). Here, the court of appeals was amply justified in refusing to consider petitioner's claims of error with respect to the failure of the trial court to compel Lassoff to testify. Petitioner's counsel called Lassoff to the stand in the jury's absence and accepted his claim of Fifth Amendment privilege without attempting to probe the basis for the claim or requesting the trial court to do so (App. 436-438). Moreover, nothing in the record even remotely suggests that the testimony of Lassoff, if it had been compelled, would have been of such vital importance to petitioner as to overcome his counsel's indifference to the matter. Indeed, shortly before calling Lassoff to the stand, petitioner's trial counsel stated out of the hearing of the jury, "[w]hy should I put Mr. Lassoff on when I already have his sworn statements in the record indicating these payments were loans to * * * [petitioner]" (App. 408). As petitioner's counsel recognized, any testimony Lassoff

might have provided that these funds were loans would merely have been cumulative of his statements already before the jury. In these circusmtances, the record refutes any contention that the trial court's failure to pursue the issue sua sponte and compel Lassoff's testimony was plain error.

b. Moreover, even if petitioner had raised the issue in a timely fashion, the trial court did not err in excusing Lassoff without testifying. The circumstances of his transactions with petitioner, together with the fact that his own returns for the same years were then being examined (App. 338-341), show an adequate basis for invoking the Fifth Amendment privilege. *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951). See *Rogers* v. *United States*, 340 U.S. 367 (1951). Once he had invoked his privilege, he was properly excused.[3]

c. Finally, petitioner contends (Pet. 25-27) that Lassoff should have been granted use immunity. But petitioner's trial counsel never sought immunity for Lassoff. Rather, this claim was raised for the first time on appeal. As the court of appeals correctly noted (Pet. App. 4a), this case is hardly a " 'compelling' " one for compulsory use immunity to insure a defendant's confrontation rights "in view of the ample parallel and circumstantial evidence and the recitation in court of Lassoff's previous statements." See *United States* v. *Turkish*, 623 F. 2d 769 (2d Cir. 1980), cert. denied, No. 80-436 (Jan. 12, 1981). Lassoff's testimony

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[3]Petitioner's claim (Pet. 9, 26, 28) that the trial court induced Lassoff to assert his Fifth Amendment privilege and then refused to inquire into the basis for the claim is without merit. Lassoff was an attorney and was no doubt well aware of his rights under the Fifth Amendment. At all events, in light of the nature of Lassoff's involvement with petitioner, Lassoff's claim of privilege was not so patently groundless that the trial court could have overruled it and directed him to answer the questions of petitioner's trial counsel. *Hoffman* v. *United States*, *supra*, 341 U.S. at 486-487.

would hardly qualify as crucial exculpatory evidence. If anything, the expressed reluctance of petitioner's trial counsel (App. 408) to call Lassoff as a witness suggests that his failure to request some form of defense witness immunity may have been a deliberate trial strategy designed to avoid exposing Lassoff to cross-examination.[4] In any event, nothing in petitioner's present claim with respect to the failure of the trial court to compel Lassoff's testimony warrants review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Petitioner's claim (Pet. 27-28) that he was prejudiced by the implication in the trial court's charge to the jury that he had equal access with the government to Lassoff's books, when in fact only the government could compel their production by a grant of immunity, is without merit. The trial court, when asked by the jury why the government did not subpoena Lassoff's books, gave an entirely fair and proper answer (App. 647-648), *i.e.*, that there was no evidence before them on this point, and they were not to speculate about it. The trial court carefully kept from the jury any discussion of Lassoff's Fifth Amendment plea, and, accordingly, any reference to the power of the government to compel his testimony by granting him immunity would have been improper and would have invited the jury to speculate about matters not in evidence.

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